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Amicus Curiæ.

Colonel William L. Royall of the Richmond Bar has prepared and asked leave to file a brief in the Supreme Court of the United States in the cases of United States *v.* American Tobacco Company and American Tobacco Company *v.* United States, as an *amicus curiæ*. The brief is an interesting and able paper in which the learned lawyer takes the ground that the "Sherman Act" in restraint of monopolies is itself in restraint of natural liberty and contrary to the Fifth Amendment to the Constitution of the United States. Colonel Royall calls attention to the fact that he prepared a pamphlet on the subject of "The Pool and the Trust," which was practically incorporated by Mr. E. J. Phelps in his brief in the case of United States *v.* Joint Traffic Association, and no acknowledgment whatever made. The Court in its decision yielded in part to the views set out by Colonel Royall in that pamphlet. The present brief is an extension and amplification of the points made in that pamphlet, and puts the points strongly. It is interesting reading, whether we agree or not with the distinguished author. The privilege of an *amicus curiæ* to be heard is one which has been oftener before the courts than most lawyers would imagine. In the latest case before the Supreme Court of the United States, in which such a brief was asked to be filed—i. e., the Northern Securities Case, 191 U. S. 555, the Court refused it, taking the ground that it did not appear that the applicant was interested in any other case to be affected by the decision in this particular case, and the other counsel in the case "standing mute," neither objecting nor consenting, although they had been informed of the application. The Supreme Court had allowed an *amicus curiæ* to file brief in Green *v.* Biddle, 8 Wheat. 17; Florida *v.* Georgia, 17 How. 491; The Gray Jacket, 5 Wall. 370; Murdock *v.* Memphis, 20 Wall. 602. In the first-

named case Henry Clay was the *amicus*. In the last, P. Phillips and R. B. Curtis were the *amici*.

In the Supreme Court of our own State in the case of Yeager, Ex parte, 11 Gratt. 655, there was an appearance and argument by an attorney as *amicus curiæ*, and no question was raised as to his right to appear. The question of the right of an *amicus curiæ* to appeal or have a writ of error or supersedeas was denied in Dunlop *v.* Commonwealth, 2 Call 284.

"The Hepburn Act."

The decision of the Supreme Court of the United States in the case of United States *ex rel.* Attorney General of U. S. *v.* Erie Railroad Co. and some eight other railroads, which was decided on May 3rd, 1909, is of unusual importance. The fundamental and underlying question was whether the so-called "Commodities Clause" amendatory of the act to regulate commerce passed July 29th, 1906, so far as its scope applies by the universality of its language to the cases before the Court was in excess of the legislative authority granted to Congress by the Constitution. For over fifty years the State of Pennsylvania had encouraged railroad and canal companies in investing funds in coal lands, so that the products of the mines might be conveniently and profitably carried to market. Large investments were made by railroad companies in coal lands and no question was ever raised as to the rights and properties acquired by these companies until in the last few years. Then proceedings were had, and the Circuit Court of Appeals—one judge dissenting—held the statute wholly void for repugnancy to the Constitution. The Supreme Court of the United States reverses the Circuit Court and holds that a railroad company is absolutely prohibited from transporting in interstate commerce, first: articles or commodities which it has manufactured, mined or produced, or which are so manufactured, etc., under its authority, and at the time of transportation the carrier has not in good faith before the act of transportation dissociated itself from such commodity or article; second: articles or commodities to be transported in whole or in part owned by the carrier; third: articles or commodities

in which at the time of transportation the carrier has an interest direct or indirect in a legal or equitable sense.

But as to this last, the Court—Justice Harlan dissenting—held that articles or commodities manufactured, mined, produced or owned, etc., by a bona fide corporation in which the railroad company is a stockholder, do not come within the purview of the statute. The sigh of relief which greeted this construction of the statute ought to have been uttered through the throats of all the steam whistles upon all the locomotives in the States. Thus construed the "Commodities Clause" become "a hollow brass." The simplicity with which it can now be evaded need scarcely be alluded to. The railroads will simply sell their coal lands to a mining corporation and owning all the stock, will carry under a slightly different name what is in reality their own property.

The majority of the Court base their opinion upon the various amendments offered in the Senate, one of which specifically prohibited the carrying of coal, etc., mined, etc., or owned by a corporation in which the railroad was interested, and which was defeated. The venerable Congressional Record was cited as authority for this—the first time, as far as the present writer is aware in which it has been used as authority—certainly the first time we have noticed it, though of course the Court was amply justified in examining the Record in order to ascertain the Legislative intent. Without the aid of this means of interpretation it would have been hard to see how the words "in which it is interested directly or indirectly" could have been reasonably and properly construed otherwise than as prohibiting railroads from transporting coal, etc., if at the time it is the owner legally or equitably of stock in the company which mined the coal or manufactured or produced the commodity transported. Mr. Justice Harlan thought the language should be thus construed, despite the Record, and so dissented.

The Color Line in Damages.

The Appellate Division of the Supreme Court of New York has lately rendered a decision by a majority of the Court holding that a negro was not entitled to the same damages as a white man, for false imprisonment. The case in point was the case of Griffin *v.* Brady. Griffin, who was a porter in a Pullman car, claimed to have been maliciously arrested by Brady, and was placed in jail. When the case was investigated by the magistrate, he was discharged. He sued Brady for ten thousand dollars.

The jury awarded Griffin $2,500, whereupon Justice Dugro told Griffin's lawyers that he would set the verdict aside unless their client would consent to a reduction of the amount of damages to $300. When the negro's counsel refused, Justice Dugro replied that no such verdict would ever stand in any court for the plaintiff. Referring to Griffin he added:

> "He was a porter and while he is just as good as the President of the United States, and if he is imprisoned wrongfully he should be paid for it, it would be a bad argument to say that he is just as good in many senses. He would not be hurt just as much if put in prison as every other man would be. That depends on a man's standing, what his circumstances are, and, if he is a colored man, the fact that he is a colored man is to be considered. In one sense a colored man is just as good as a white man, for the law says he is, but he has not the same amount of injury under all circumstances that a white man would have. Maybe in a colored community down South, where the white man was held in great disfavor, he might be more injured, but after all that is not this sort of a community. In this sort of a community I dare say the amount of evil that would flow to the colored man from a charge like this would not be as great as it probably would be to a white man."

Justice Dugro added that he was confident that the porter would have been delighted to take $2,500 for the arrest and lying in jail for two hours, but that he had kept his job and that it was not shown that his employers had lost confidence in him because of the arrest.

Presiding Justice Patterson and Justice Clark of the Supreme Court dissented from the decision of the majority of the Court.

We wonder if the learned judges quoted the case of Bodrengam *v.* Arcedekne, which was reported in Year Book 30 and 31, Edw. I, page 106, decided in the year 1302, because we imagine that the Court would have to have gone that far back for authority to sustain this remarkable decision. Justice Brumpton in this ancient case said: "That a buffet given to a Knight or Noble was as bad as a wound given to one of the rabble," but we imagined the world had advanced a little since that time and that the law knew no man's color when he was impleaded in the courts. We must confess that personally we are inclined to think that the opinion of the majority of the Court was right and that in fixing damages the station of a man in life should be the guide in the ascertainment, but we do not think that the law books have always sustained this in questions where exemplary damages are allowed. Of course this was purely a question of exemplary damages. Having sustained the right to minor damages, which of course was clearly proven in this case, then under our jurisdiction the jury would have had a right to fix them at such rate as they saw fit, subject of course to the review by the Court in case the amount of damages indicated that the jury was influenced by improper motives.

There is another side, however, to this case which the learned Justices do not seem to have considered. The injury to a man for false imprisonment might be far greater in the case of an humble man working for a daily wage than in the case of a millionaire. The fact that the former had once been in prison, although innocent, might cause him to have great trouble in securing a position such as a porter upon a Pullman car, or in any of the minor positions where his character was his main asset. The injury, therefore for false imprisonment to a porter on a Pullman car, even though he was colored, might be far greater than to a Vanderbilt or a Rockefeller. We are exceedingly glad that this decision came from a court of justice north of the Potomac. Had it occurred in a Southern State we can imagine the agony of mind that it would have cost the *New York Evening Post* and a few other journals of that character. We do not believe that in our Court of Appeals the Court would have listened for one moment to an argument based upon the color of the suitor before it.

Municipal Corporations.

Amongst the decisions handed down by the Supreme Court of Appeals at its present session in Wytheville some questions of novelty and importance in regard to municipal corporations, their rights, duties and liabilities, have been handed down. One of decided novelty is the case of McCrorey *v.* Garrett, decided on June 10th, 1909. This case, which will be well for merchants and others who are using awnings over the street to heed, may at first glance seem to be somewhat surprising; but upon reading the opinion there can be no question not only of its correctness but of its great value. The Court in terms decides that a person who erects an awning over a public highway or street does so at his own risk and becomes in fact, as to persons lawfully using the street, an insurer. He maintains the same at his own peril and any one receiving an injury from said awning, being himself free from blame, has a good cause of action against the owner thereof, regardless of the question of his negligence in the construction and maintenance of such awning. See also McCrorey *v.* Thomas, 63 S. E. 1011, ante, p. 228.

The second case is the City of Richmond *v.* Mason, decided on June 10th. Here a lady sued for damages sustained by her, in stepping into a trench or hole in the road bed at the point of intersection of two streets in the newly annexed territory of the City of Richmond. The Court holds that the city does not become liable immediately upon the consummation of the annexation of the new territory, for injury sustained by reason of defects in the sidewalks and streets or insufficient lighting, but only after a reasonable time has elapsed in which its duty to make such streets and sidewalks reasonably safe could have been performed, and that what is such reasonable time is a fact to be ascertained by the jury upon proper evidence and proper instructions as to the law bearing upon the evidence. This is a case of first intention in the State upon this point.

In the case of the White-Oak Coal Company *v.* The City of Manchester, opinion handed down on June 10th, the City of Manchester has an ordinance requiring a license upon vehicles engaged in the hauling through the streets of the city. The coal company, owner of a vehicle in Richmond, hauled coal through

the City of Manchester and was convicted and fined for violation of an ordinance requiring a license upon carts so engaged. The Court held that the city had no right to inflict this fine because the only proof was the sporadic act of hauling a single consignment of coal from the siding in Manchester over the streets of the city to a customer on the outside, and that such an act could not constitute the carrying on of a business or occupation within the city as would subject the coal company to the license tax on vehicles imposed by the ordinance. The coal company was of course a non-resident of the City of Manchester. The question of such licenses has been before the Court in the case of Fromer *v.* The City of Richmond, 31 Gr. 646. Fromer lived outside the city but rented a stall in the City Market, where he conducted his business as a butcher. He prepared his meat for market at his residence outside the city and used his carts to haul it into the city. He was held liable for license tax by the city, and the Supreme Court sustained the license tax as to him.